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No. _____

In The

Supreme Court of the United States

LARRY AND CHOH-YING GEDDES,

Petitioners,

v.

MILL CREEK COUNTRY CLUB, INC., AND AMERICAN GOLF CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. FOR PURPOSES OF INJUNCTIVE RELIEF, DOES EQUITABLE ESTOPPEL EVER SERVE AS A DEFENSE TO AN INTENTIONAL, CONTINUOUS TRESPASS?

RULE 14.1(b) STATEMENT

A list of all the parties is contained in the caption and the Petitioner herein is not a corporation.

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I. OPINION BELOW

Geddes, et al. v. Mill Creek Country Club, et al., 196 Ill.App.2d 302, 256 Ill.Dec. 313, 751 N.E.2d 1150 (Ill. 2001). (App. 1)

II. STATEMENT OF JURISDICTION

On May 24, 2001, the Illinois Supreme Court adjudicated *Geddes, et al. v. Mill Creek Country Club, et al.*, 196 Ill.App.2d 302, 256 Ill.Dec. 313, 751 N.E.2d 1150 (Ill. 2001). On June 29, 2001, the Illinois Court denied Plaintiffs' Motion for Rehearing. Jurisdiction is derived from Supreme Court Rule 10 in that the Illinois court of last resort has decided an important question of federal common law in contravention of the federal courts as well as courts of last resort in other states.

III. CONSTITUTIONAL PROVISIONS

At issue in the case at bar remains one of the most fundamental tenets of the United States Constitution. Article Four thereof states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . .

U.S. Const. Art. IV.

Likewise, the Illinois Constitution states:

Article I, Section 1.

Section 1. INHERENT AND INALIENABLE RIGHTS

> All men are by nature free and independent and have certain inherent and inalienable rights, among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

These fundamental tenets have created the body of common law which involves basic property rights. In the case presented today, the Illinois Supreme Court held, as a matter of law, that one property owner could, intentionally and continuously, trespass upon an adjacent property owner by virtue of equitable estoppel. This holding is unprecedented, ignores over two centuries of case law and violates numerous, well-settled precepts of property law.

IV. STATEMENT OF FACTS/PROCEDURAL HISTORY

A. THE PLEADINGS

On July 29, 1998, Plaintiffs filed their Verified Complaint for declaratory action, injunctive relief and monetary damages. (C-002.) The Complaint prayed for a restraining order enjoining the intentional trespass (C-002-014.) The basis of the lawsuit alleged that the Mill Creek Golf Club and the operation of the fifth hole was such that thousands of golf balls were launched onto Plaintiffs' property. (C-003.) Plaintiffs maintained that the regularity of golf balls being hit from the golf club affected their enjoyment of the property and posed an

impediment to the operation of Plaintiffs' landscaping/ nursery business. (C-004.) Plaintiffs further alleged that they had contacted the Defendants, but the Defendants refused to take any remedial action. (C-004.) Under essentially the same facts, Plaintiffs also stated a cause of action sounding in nuisance. (C-005-008.)

Also on July 29, 1998, Plaintiffs filed their emergency motion for a temporary restraining order. (C-015.) On July 31, 1998, Defendants filed its 2-619 and 2-615 Motions to Dismiss. (C-018-30.) On July 31, 1998, the trial court denied Plaintiffs' motion for a temporary restraining order and scheduled a pre-trial hearing as well as an evidentiary hearing on the preliminary injunction. (C-31.) On August 17, 1998, Plaintiffs filed their Amended Complaint under the same legal theories. (C-32.) As damages, Plaintiffs alleged they were unable to develop the affected land as part of their landscape/nursery business. (C-36.) Plaintiffs were zoned to allow a retail center for their landscaping/nursery business, and intended to use their land, which was being deposited with golf balls, in order to cultivate materials for the retail center. (C-36.)

Defendants filed 2-619 and 2-615 motions, which were denied on September 4, 1998. A bench trial commenced on February 16, 1999 and concluded on February 17, 1999.

B. TRIAL TESTIMONY

Larry Geddes testified[1] that he lives, along with his wife, Choh-Ying, on a 16½-acre parcel which is adjacent

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[1] The testimony of Larry Geddes was not transcribed, but is included in the record as a Bystander Report.

to the Mill Creek Subdivision. Mr. Geddes testified that he and his wife purchased the property and have lived there since December of 1986. In the late summer of 1996, when the Mill Creek Golf Club was constructed, he began finding golf balls on his property. Mr. Geddes testified that the golf balls landing on his property originated from the Mill Creek Golf Course, and that fact was not disputed. Mr. Geddes contacted the Defendant, but Mill Creek did not take any affirmative action to abate the golf balls. Mr. Geddes testified that he received a letter from Defendant's lawyer indicating that the Defendant was not responsible nor liable for the presence of golf balls on Mr. Geddes' property. Mr. Geddes testified that at first, he gave away the golf balls which he found on his property. In 1997, Mr. Geddes stated collecting the golf balls. Mr. Geddes testified that during the 1998 golf season, he had collected 2,128 golf balls. Mr. Geddes opined that the terrain was such that more golf balls are present but were not readily noticeable.

Mr. Geddes testified that his use of his land, as zoned agricultural, permitted the construction of greenhouses and areas where customers would pick vegetables and other crops. Mr. Geddes documented that when he and his wife applied for and obtained rezoning for a portion of their property, the owners of Mill Creek Subdivision objected. (Plaintiffs' Exhibit No. 5.) Pursuant to their rezoning, Mr. Geddes caused a well to be drilled and hired an architect to contract a building for retail sales of flowers and nursery products. Mr. Geddes testified that the golf balls were impacting his ability to enjoy his property and develop his land as zoned and permitted by Kane County, the jurisdictional authority. Mr. Geddes

testified that he planned to use that location on the property for cultivating plants through greenhomes for the nursery business.

Mr. Geddes acknowledged that in 1994 he and his wife, Choh-Ying Geddes, had entered into an agreement with the Defendant, Mill Creek Country Club (Defendants' Exhibit No. 10.). Mr. Geddes testified that the agreement was meant to protect both parties with respect to the development of each party's land. Mr. Geddes admitted that the agreement contained a provision which obligated him and his wife not to protest the Mill Creek development. Mr. Geddes further testified that the Defendant, through its agent, asked him on three separate occasions if he wanted to move his house or sell his property subsequent to the 1994 agreement.

Upon re-direct examination, Mr. Geddes testified that the agreement signed between the parties in 1994 did not mention the trespass he experienced and continues to endure. Mr. Geddes testified that he knew nothing about the game of golf and that he had never played the game. Mr. Geddes also testified that if he had known of the golf ball problem and its impact on his property, he would have objected to the golf course subdivision.

The second witness to testify was David Patzelt, an officer of the Defendant. (Tr.[2] at 93-94.) Mr. Patzelt also testified that he had seen the golf balls on Plaintiffs' property. (Tr. at 36.) Mr. Patzelt opined that the golf balls landing on the Plaintiffs' property did not constitute an

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[2] The transcript is part of the record, but numbered differently.

unreasonable interference. (Tr. at 41-43.) Mr. Patzelt stated that the presence of golf balls on the Plaintiffs' property "do not impair a reasonable individuals' use and enjoyment of the property." (C-188.) Mr. Patzelt stated that "the golf ball is no different than – in my opinion – no different than a rock" in terms of farming. (Tr. at 35.) Mr. Patzelt acknowledged that the "rocks" would have to fly over the property boundary in order to reach Plaintiffs' property. (Tr. at 35.)

Mr. Patzelt testified that he oversaw construction of the Mill Creek Golf Course, and that he worked with the architect and learned about golf course construction. (Tr. at 44-45.) Mr. Patzelt testified that the eastern edge of the fairway landing area is twenty-five (25) feet away from the Plaintiffs' property (Tr. at 74-78.) Between the fairway and the Plaintiffs' property line was the asphalt cart path (Tr. at 78.) and that the prevalent wind direction was from the west. (Tr. at 79.) He also acknowledged that most golfers slice or hit the ball right-of-target. (Tr. at 84.) Mr. Patzelt opined that the fifth hole, as designed, was acceptable from a golf design standard. (Tr. at 82-85.) Mr. Patzelt concluded that the design would be acceptable if the fairway was one foot away from the Plaintiffs' property, so long as width of the hole was 300 feet. (Tr. at 82-83.)

The next witness was Kent Shodeen, the principal of Mill Creek Golf Club, Inc. Mr. Shodeen testified that he knew the Plaintiffs would receive golf balls on their property when he signed the 1994 agreement with the Plaintiffs. Shodeen testified that the design of the golf hole affecting Plaintiffs' land was not completed until 1995. (Tr. at 98-100.) Mr. Shodeen testified that he did not tell

the Plaintiffs about the golf balls because "it did not occur to him." (Tr. at 101.) Mr. Shodeen stated that he was contacted several times by the Plaintiffs about the golf ball problem. (Tr. at 102.) Mr. Shodeen testified that he made no design changes or implemented any abatement of Plaintiffs' Complaint. (Tr. at 104.) Shodeen agreed that the basis of the 1994 agreement was to protect each party's land use rights. (Tr. 150.)

Mr. Shodeen testified that he asked the Plaintiffs if they wanted to relocate at least once. (Tr. at 137.) Mr. Shodeen also testified that currently, Mill Creek Golf Club has twenty (20) operational holes (Tr. at 141.), but that, in his opinion, the Plaintiffs should have to live with the golf balls being launched on their property from the Mill Creek Golf Club. (Tr. at 150.)

The last witness to testify was Choh-Ying Geddes, the Co-Plaintiff. She testified that the Plaintiffs operate a landscape/nursery business, using the entire 16½-acre parcel. Between 1992 and 1994, the Plaintiffs negotiated an agreement with the developer of the golf course. (Tr. at 167.) Mrs. Geddes testified that the basis of the agreement was to protect both sides, but that she was not protected. (Tr. at 167.) Mrs. Geddes testified that between 1997 and 1998, she and her husband collected 2,148 golf balls. (Tr. at 170; Plaintiffs' Ex. No. 7.) Mrs. Geddes further testified that there are more golf balls on their property. (Tr. at 170.)

Mrs. Geddes testified that up until 1994 when the contract was signed, the Plaintiffs' relationship with the developer was cordial. (Tr. at 171.) Subsequent to the agreement, however, Mrs. Geddes testified that the

response of the developer changed. (Tr. at 172.) Mrs. Geddes testified that she spoke with Mr. Patzelt about the golf ball problem on numerous occasions, but that he did nothing. (Tr. at 177.) Mrs. Geddes also testified that the Defendants and their representatives had inquired of the Plaintiffs, on numerous occasions, about moving their house. (Tr. at 184-185.)

Mrs. Geddes testified that the impact of the golf balls is significant in that the Plaintiffs have been unable to utilize a substantial portion of their property. (Tr. at 178-179.) The Plaintiffs are unable to construct poly-houses or greenhouses used to grow flowers for retail sale and use areas of the property for pick-your-own vegetables and pumpkins. (Tr. at 179.) She testified that she is unable to develop that portion of her land consistent with Plaintiffs' Exhibit #9. (Tr. at 188.)

Mrs. Geddes testified that she knew nothing about the game of golf and still does not. (Tr. at 195.) She testified that the golf balls landing on her property was a surprise to her. (Tr. at 196.) She further testified that had she known about the golf balls, she would have objected to the development of the golf course during the zoning process. (Tr. at 196.)

C. COURT DECISIONS

At the close of evidence of February 17, 1999, the court heard oral arguments and allowed for the filing of trial briefs within seven days. (Tr. at 196-212.) In their trial brief, Plaintiffs cited federal law, Illinois law and out-of-state cases because the fact pattern was a matter of first impression. The trial court set a decision date of

April 16, 1999, but rendered a written decision dismissing the case on March 15, 1999. (App. at 37-39).

A timely appeal was filed by the Plaintiffs. Subsequent to the filing of briefs, the Appellate Majority held that the trial court's decision was not against the manifest weight of the evidence. (App. at 19). In a dissenting opinion, Justice Inglis wrote that Plaintiffs had sufficiently proven both a trespass and a nuisance, and therefore injunctive relief was appropriate. (App. at 31). In its Rule 23, non-published order, the Appellate Court Majority reviewed the case *de novo.* Whereas the trial court acknowledged the trespass and found the remedy of closing the hole to be "over broad" and "facially inequitable" (Appendix at 38), the Appellate Majority issued a new rule of law as it pertains to common law trespass. The Appeals Court did not analyze the equities, but instead held, as a matter of law, that the trespass was unintentional and therefore ineligible for injunctive relief. In its reasoning, the Appellate Majority created a different legal standard for "intent" under both Illinois and its federal common law counterpart. Since this was a departure from established precedent, the Plaintiffs filed a Motion to Publish. That motion was denied, with Justice Inglis dissenting. (App. at 31). Plaintiff filed a Petition for Rehearing and that was denied, also with Justice Inglis dissenting. (App. at 36).

Plaintiffs filed a timely writ of certiorari to the Illinois Supreme Court, and that appeal was granted under the discretionary powers of the Court. In its Opinion and Order, the Illinois Supreme Court held that Plaintiffs were equitably estopped from the intentional, continuing

trespass, even though that trespass was knowingly created and maintained by the Defendant.

V. ARGUMENT

A. EQUITABLE ESTOPPEL DOES NOT APPLY TO INTENTIONAL TRESPASS

In its trial brief and throughout the appeal process, Plaintiffs have cited federal case law involving trespass and injunctive relief. In *Okaw Drainage District of Champaign and Douglas County v. National Distillers and Chemical Corporation*, 882 F.2d 1241 (7th Cir. 1989), the Seventh Circuit held that a property owner is entitled to automatic injunctive relief against a trespasser. The *Okaw* court made no qualifications, and further explained the difference with regard to injunctions sought by property owners and non-property owners. In the *Okaw* case, the Plaintiff sought injunctive relief against the Defendant over the use of a drainage ditch. In upholding the denial of the requested relief, the Court held:

> Once the drainage district's claim of trespass is rejected, the fatal weakness of its case lies on the remedial rather than on the substantive cost of maintenance that the pumped-in water imposes on it, or even an injunction against U.S.I.'s pumping water into the ditch without paying that cost. Those would be forms of relief tailored to its claim of nuisance. It is seeking instead an injunction against U.S.I.'s pumping any water into the ditch. An injunction so much broader in scope than the injury sought to be prevented would, if granted, exhibit a lack of equity on its face, and this is reason enough for refusing to

> issue the injunction. ***The broader point is that an injunction other than one designed to secure a property right may not be granted without consideration of the equities,*** including the costs that the injunction is likely to impose on third parties – *see*, e.g., *Evans v. City of Evanston*, 881 F.2d 362 at 385 (7th Cir. 1989); *United States v. City of Chicago*, 870 F.2d 1256, 1262-63 (7th Cir. 1989); *Xasper v. Board of Election Commissioners*, 814 F.2d 332, 338 (7th Cir. 1987). (Emphasis added.)

882 F.2d at 1247-48.

Two paragraphs later the *Okaw* court held:

> The issue of injunctive relief might stand differently if the district had succeeded in establishing an owner's right to exclude U.S.I. from the ditch. **The essence of a property right is that the owner need not show, in order to prevent interference with it, that it is worth more to him than to a trespasser.** *See*, e.g., *Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11, 20, 191 N.E. 239, 243 (1934). **To require such proof would convert property rules into liability rules.** But the drainage district did not establish an owner's right; it does not own the river. To obtain an injunction, therefore, it had to show that the balance of equities inclined to it. *See, Smith v. City of Woodstock*, 17 Ill.App.3d 948, 955, 309 N.E.2d 45, 49 (1974). (Emphasis added.)

882 F.2d at 1248.

Citing Illinois case law, the *Okaw* court concludes that " . . . the owner of property has the exclusive right to the use of the property and an automatic right to an injunction against a trespasser." (882 F.2d at 1248.) All three

levels of the Illinois court system were faced with this argument, yet each decision failed to adjudicate the issue on its merits. By adopting an equitable approach, the trial court ignored the *Okaw* case and misstated Plaintiffs' prayer for relief. The Appellate Court's rationale also disregarded *Okaw* and its application of Illinois case law.

The Illinois Supreme Court also failed to consider or otherwise mention the Seventh Circuit's application of trespass as it relates to ownership of property and the rights thereto. Instead, the Illinois Supreme Court focused on equitable estoppel, but never in the context of an intentional trespass. The Court held that estoppel applied by virtue of the contract, but evaded a direct analysis of whether equitable estoppel can preclude enjoining a trespasser. In Illinois and under the federal common law, the only recognized defense to a trespass is license or consent. *U.S. v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D. Cal. 1992).

Perhaps unintentionally, the Illinois Supreme Court acknowledged the intentional nature of the trespass. At trial, Plaintiffs had testified in unrebutted evidence that they knew nothing about the game of golf and had no idea about the impending barrage. The Court's rationale as to this issue was to render a legal holding which eviscerated the strength of this uncontested testimony:

> We repeat: it is a matter of common knowledge that golfers do not always hit their shots straight. **Defendants knew it. This axiomatic proposition is evidenced by Shodeen's assumption that plaintiffs would have some golf balls on their property.** However, plaintiffs

> also knew it. This is evidenced by the agreement provision that plaintiffs' property be surrounded by an eight-foot-high fence with landscaping that includes trees over that height. Even assuming that plaintiffs did not know of this fact of life, they reasonably should have. Plaintiffs cannot avoid the reasonable results of their conduct. (Emphasis added).

751 N.E.2d at 1158-59. (App. at 16).

As a matter of law, the Illinois Supreme Court negated Plaintiffs' testimony and held that Plaintiffs knew (or should have known) that their property would be bombarded with golf balls to the extent that Plaintiffs could not use a substantial portion of that property. More importantly, the Court acknowledged that "Defendants knew it". There is no other way to construe this holding other than Defendant did in fact knowingly trespass, and continues to do so intentionally. Without expressly stating it, then, the Court has effectively held that equitable estoppel remains a valid defense to an intentional trespass. In so doing, the Illinois Supreme Court, in the name of equity, put a burden of foreseeability on a property owner as it relates to a trespasser. Because this has never been done before, and because this holding contravenes established federal common law, the Supreme Court should grant certiorari and hear this case.

Indeed, the holding of the Illinois Supreme Court runs contrary to the existing body of federal case law as well as the court decisions in other states. In its brief to the Illinois Supreme Court, the Defendants could not cite one case where equitable estoppel served to bar injunctive relief for an intentional trespass. Up until the Illinois

Supreme Court adjudicated the case at bar, no such precedent existed. Federal courts interpreting state law and common law have held, similar to *Okaw*, that where the Defendant's action involves an intentional trespass, the balancing of equities is improper. *Louis W. Epstein Family Partnership v. K-Mart Corporation*, 828 F.Supp. 328 (E.D. PA. 1993) affirmed in part, reversed in part, 13 F.2d 762; *U.S. v. Gardner*, 903 F.Supp. 1394 (D. Nev. 1995), affirmed, 107 F.3d 1314; *U.S. v. Santos*, 878 F.Supp. 1359 (D. Guam 1993); *Greyhound Lines, Inc. v. Peter Pan Bus Lines*, 845 F.Supp. 295 (E.D. PA. 1984); *Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Georghegan*, 281 F.Supp 116 (D.C. 1967); *Okaw Drainage District of Champaign and Douglas County v. National Distillers and Chemical Corporation*, 882 F.2d 1241 (7th Cir. 1989).

In *Ramirez de Arollano v. Weinberger*, 745 F.2d 1500 (1984), the federal appeals court held:

> From the earliest times, courts in equity have considered an injury to real property to be irremediable at law. The uniqueness of land typically makes damages an inadequate remedy. Equity will not hesitate to enjoin an unconstitutional taking or even a repeated trespass or other nuisance to land.

745 F.2d at 1527-28.

In support of this firm rule of law, the court cites, in a footnote, *Erhardt v. Boaro*, 113 U.S. 537, 5 S.Ct. 565, 28 L.Ed. 1116 (1985). See also, *Graves v. Ashburn*, 215 U.S. 331, 305 S.Ct. 108, 54 L.Ed. 217 (1909). The federal courts have always held that a continuing trespass will be

enjoined absent license or consent. *U.S. v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D. Cal. 1992); *United States v. Zenon*, 711 F.2d 476 (1st Cir. 1983).

State courts throughout the nation have echoed these common law principles. *Thigpen v. Moss*, 504 So.2d 664 (La. App. 1987); *Nicholas v. Bossert*, 727 S.W.2d 211 (Mo. App. 1987); *Wheelock v. Noonan*, 108 N.Y. 179, 15 N.E. 67 (1888); *Hatanaka v. Struhs*, 738 P.2d 1052 (Utah App. 1987); *Bradley v. American Smelting and Refining Co.*, 104 Wash. 2d 677, 709 P.2d 782 (1985); *Tortolano v. DiFillipio*, 115 R.I. 496, 349 A.2d 48 (1975); *Wilmont Homes, Inc. v. Weiler*, 42 Del.Ch. 8, 202 A.2d 576 (1964); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. App. 1984); *Cobai v. Young*, 679 P.2d 121 (Colo. App. 1984); *Lanier v. Ocean Pond Fishing Club, Inc.*, 253 GA. 549, 322 S.E.2d 494 (GA. 1984). In all of those cases, the state courts have held that to secure constitutional property rights, a trespasser will be enjoined.

Even more specific to the case at bar, courts of last resort and appellate courts in other states have uniformly forced golf course owners who have committed a trespass or a nuisance to institute remediation and abatement of that activity through redesign or additional constraints. In *Sierra Screw Products v. Azusa Greens, Inc.*, 88 Cal. App.3d 358, 151 Cal. Rptr. 799 (2nd Dist. 1979), the court found that notwithstanding the golf course's permitted zoning, the operation created a nuisance for the adjacent homeowners. Accordingly, the court issued injunctive relief, which ordered the defendants to minimize the intrusion of the golf balls. See also, *Sans v. Ramsey Golf and Country Club, Inc.*, 29 N.J. 438, 149 A.2d 599 (N.J. 1959), where the New Jersey Supreme Court also issued injunctive relief.

In *Fenton v. Quabog Country Club, Inc.*, 353 Mass. 534, 233 N.E.2d 216 (Mass. 1968), the court held that the owners of residential property adjacent to a golf course were entitled to injunctive relief to abate the trespass of golf balls which entered upon their property. Even though the Plaintiffs in this case moved[3] into a residence which had an existing golf course, the court issued injunctive relief and stated:

> We have no doubts about the propriety of the injunction. The Plaintiffs are clearly entitled to an abatement of the trespass. *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 489, 104 N.E. 371, *Ferriter v. Herlihy*, 287 Mass. 138, 141-144, 191 N.E. 352. We paraphrase the apt expression of Chief Justice Rugg in the *Stevens* case: 'The pertinent inquiry is whether the noise (the invasion of golf balls) materially interferes with the physical comfort of existence, not according to exceptionally refined, uncommon, or luxurious habits of living (e.g., golf addiction), but according to the simple tastes and unaffected notions generally prevailing among plain people (non-golfers). The standard is what ordinary people (again those who eschew golf), acting reasonably, have a right to demand in the way of health and comfort under all the circumstances.' Were it not that this court cannot assume the functions of a Robert Trent Jones, we should make a judicial suggestion that the defendant's burden under the injunction will be considerably eased by shifting the location of the trap to the northeasterly corner of the green on the

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[3] In the instant case, Plaintiffs had lived upon their property for ten years prior to the operation of the golf course.

> assumption, and on this the record is silent, that none exists there now.

233 N.E. at 220. See also, *Chinchic v. McLewis*, 1995 W.L. 312, 666 (Ohio App. 11th Dist.).

In the case at bar, the Illinois courts have confused trespass with nuisance. Plaintiffs cited federal case law – and specifically the *Okaw* case throughout the course of this litigation. The trial court failed to address any of the federal or state precedents cited by the Plaintiffs. In its Order, the trial court applied equitable principles and simultaneously misconstrued Plaintiffs' prayer for relief. Although the Plaintiffs prayed for abatement of the trespass (App. at 33), the trial court found that closing the golf hole would be "overboard and facially inequitable." (App. at 38). The Order of the trial court generated more questions than it did answers.

On the first appeal, the Second District Appellate Court likewise failed to consider the state and federal precedents cited by Plaintiffs. In fact, the Defendants did not even argue estoppel in its brief. Instead, the Defendant maintained that it could not possibly be responsible for the unintentional acts of third parties, and therefore the legal standard for enjoining the trespass was not met. The appeals court embraced this argument, and held that because the trespass was not intentional, Plaintiffs had failed to sustain their burden of proof. The appeals court also held that the nuisance was unintentional and therefore no injunction would lie. In its non-published Rule 23 Opinion and Order, the appellate court redefined "intent" relative to Illinois and federal case law and created an

entirely new legal standard for pleading nuisance. Nevertheless, the appeals court denied Plaintiffs' Motion to Publish and denied Plaintiffs' Petition for Rehearing.

The Plaintiffs filed its Petition for Leave to Appeal to the Supreme Court of Illinois, and that petition was granted on May 31, 2000. The Plaintiffs' reiterated their legal theory that a court of equity would not endure an intentional and continuing trespass absent license or consent. The Defendants, however, altered their position. Rather than defending the appellate court decision, the Defendants focused entirely on an equitable estoppel claim. This was a radical departure in the Defendant's litigation strategy; even though the Defendant had pled this defense at trial, it was never argued with any fervor at that level or on the initial appeal. At the Illinois Supreme Court, the Defendant relied entirely on this theory.

The basis of the estoppel argument rested with the 1994 contract (App. at 41). There were, however, numerous factual issues to overcome. For example, both Plaintiff and Defendant had testified that the 1994 contract was intended to protect the land use rights of the respective parties. (Bystander Report; Tr. at 150, 167). Once the golf course became operational, Plaintiffs immediately notified Defendant of the problem, and the Defendant took no remedial action. Moreover, the golf course design, which is the source of the trespass, was completed in 1995, a year after the 1994 contract was executed. (Tr. at 102.) Finally, both Plaintiffs testified, unrebutted, that they knew nothing about the game of golf and were therefore unaware that the Defendants' golf course would effectively take a substantial portion of their property.

In addition to avoiding the firm legal precept that equity will not condone a trespass, the Illinois Supreme Court actually had to create a novel legal standard to hold in favor of Defendants. Even though the uncontested evidence established that Defendant knew that Plaintiffs' property would be a receptacle for golf balls when the 1994 contract was executed – and Defendant did not tell the Plaintiffs – the Illinois Supreme Court decreed that Plaintiffs **should have known** because "[t]his condition is as natural as gravity or ordinary rainfall." (App. at 15). This is truly incredible. The highest court of equity in the State of Illinois eviscerated unrebutted trial testimony through a legal holding which "needs no citation of authority." (App. at 15). Notwithstanding the fact that Plaintiffs testified they had no knowledge of the game, the court's legal holding mandates an understanding of golf and equates that knowledge with basic grade school curriculum subjects. Indeed, the court could not have reached its conclusion without creating this legal fiction.

This inherently inequitable result is especially egregious in view of the uncontested fact that Defendant knew Plaintiffs would be subjected to this barrage of golf balls. But the injustice does not stop there. Defendant also admitted that the purpose of the 1994 contract – the basis for the estoppel – was to protect each other's land use rights. (Tr. at 150). After the course was constructed and Plaintiffs complained on numerous occasions, Defendants took no remedial action. (Tr. at 104).

The holding of the Illinois Supreme Court in the case at bar defies the federal common law, every reported state law decision, and the Constitution from which these

precedents derive. In the case before the Illinois Supreme Court, the Defendant was unable to cite one authority where an intentional and continuous trespass was endorsed by way of an estoppel claim. Until the Illinois Supreme Court rendered its holding in this case, no such authority existed. In certain instances, equity would bar a nuisance claim, but never a continuous trespass. Up until now in the State of Illinois, and everywhere else in this nation, the only defense to a trespass was consent or license. *Hendle v. Stevens*, 224 Ill.App.3d 1048, 586 N.E.2d 826 (2nd Dist. 1992); *U.S. v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D. Cal 1992).

The common law with respect to trespass, both federal as well as those of the individual states, has evolved from the statement of basic freedoms in the United States and Illinois Constitutions. The only defense heretofore to a trespass has been license or consent. The Illinois Supreme Court expanded the defense to a trespass without even addressing the applicability of equitable estoppel. If, as in the case *sub judice*, estoppel applies, it must be via the 1994 contract. Yet the contract does not contemplate a trespass, even though Defendant admitted it was inevitable, but was not disclosed to the Plaintiffs. Effectively, the Illinois Supreme Court has done exactly what Judge Posner warned against in the *Okaw* case: it has converted property rights into liability rules. This is evident in the "reasonably should have known" standard created by the court. The end result is that the Defendant has taken the Plaintiffs' land without disclosure or compensation. Because the U.S. Supreme Court has never condoned, endorsed or even considered this theory,

Plaintiffs' writ of certiorari should be granted and the court should squarely address the issue.

Once a property owner is held to a "reasonably should have known" standard in relation to an intentional trespass, the flood gates vis-a-vis property rights have opened. In a rapidly developing nation where agricultural land is enveloped by expanding suburbia, how will this principle of law be applied? Conceivably, a property owner who did not object to the proposed zoning for a neighboring factory would be barred from legal recourse in the event his land is polluted as a result of the operation of that factory. Unquestionably, it is common knowledge that factories pollute, but a property owner has never been held to a foreseeability standard in relation to a trespass. Clearly, ratifying the concept of estoppel as a defense to a continuous trespass creates a myriad of loopholes which heretofore did not exist.

The applicability of equitable estoppel as a defense to a knowing and continuous trespass represents a chink in the armor of real property rights. For the Plaintiffs, the only barrier between losing ten acres of land, on a permanent basis, remains the discretion of this Court. But this case is not about golf balls or the nuances surrounding the game of golf. Rather, this case is about fundamental property rights, the origin of which remain articulated in the Declaration of Independence. The availability of estoppel to a wilful use of another's property involves the desecration of a sacred principle and replaces that principle with subjective value opinions which cannot possibly be adjudicated uniformly. Equity has never placed a burden of foreseeability upon the rights of a property owner as it applies to a wilful and continuous

trespasser. Because the Illinois Court of last resort has done just that, this court should allow Plaintiffs' Leave to Appeal and restore the integrity of the Constitution.

WHEREFORE, Plaintiffs, Larry and Choh-Ying Geddes, respectfully request that the court consider the matters raised herein, find that the issue of whether equitable estoppel applies as a defense to a knowing and continuous trespass raises an issue of federal import, and allow Plaintiffs' Petition for a Writ of Certiorari.

Respectfully submitted,

Larry & Choh-Ying Geddes

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SUPREME COURT OF ILLINOIS

Docket No. 89269 – Agenda 17 – January 2001.

LARRY GEDDES *et al.*, Appellants, v.
MILL CREEK COUNTRY CLUB, INC., *et al.*, Appellees.

(Filed May 24, 2001)

JUSTICE FREEMAN delivered the opinion of the court:

Plaintiffs, Larry and Choh-Ying Geddes, filed a complaint in the circuit court of Kane County against defendants, Mill Creek Country Club, Inc., and American Golf Corporation. The complaint contained actions for intentional trespass and intentional private nuisance based on errant golf balls hit onto their property from defendants' adjacent golf course. Following a bench trial, the trial court entered judgment in favor of defendants. The appellate court affirmed. No. 2-99-0370 (unpublished order under Supreme Court Rule 23). We allowed plaintiffs' petition for leave to appeal (177 Ill. 2d R. 315(a)). We now affirm the judgment of the appellate court.

BACKGROUND

Plaintiffs' complaint, as amended, alleged as follows. Plaintiffs own approximately 16 acres of land in Kane County. They reside on the property and use it for their gradually developing agricultural and landscaping business.

Mill Creek Country Club constructed and owns a golf course known as Mill Creek Golf Club. The course is leased to American Golf Corporation, which performs daily tasks such as collecting greens fees and maintaining the course.

Defendants caused and allowed golf balls to continually invade plaintiffs' property. Plaintiffs' business is seasonal and coincides with the golf season. "[D]ue to the constant stream of uninvited, wayward golf balls," plaintiffs have not been able to use significant portions of their property. Defendants' intentional acts constituted both an intentional trespass and a private nuisance. Plaintiffs sought an injunction against defendants, *i.e.*, plaintiffs asked the trial court to "enjoin the Defendants from causing and allowing the continual trespass of golf balls to occur." Plaintiffs also sought compensatory and punitive damages.

In their answer, defendants denied all material allegations and pled the affirmative defense of estoppel. Defendants alleged that plaintiffs were estopped from bringing their claims by virtue of plaintiffs' conduct, memorialized in a prior agreement.

Prior to trial, the court: denied plaintiffs' motion for a temporary restraining order; entered an agreed order dismissing plaintiffs' motion for a preliminary injunction; denied defendants' motion to dismiss (see 735 ILCS 5/2-615, 2-619 (West 1998)); and denied plaintiffs' motion for summary judgment (see 735 ILCS 5/2-1005 (West 1998)). The cause proceeded to a bench trial.

The evidence at trial included the testimony of plaintiffs; Kent Shodeen, president of Sho-Deen, Inc.; and David Patzelt, vice-president of Sho-Deen. The parties presented the following pertinent evidence. In 1986, plaintiffs bought 16.5 acres in Kane County. The property is rectangular in shape, with the north-south dimension slightly larger than the east-west dimension.

In the same area, Sho-Deen was developing approximately 1,450 acres as a planned unit development. A planned unit development is a land use control device that often combines subdivision regulations and zoning for the unified development of a large geographic area. Rather than seeking piecemeal variances or rezoning, a coordinated plan is drawn up and approved as a special use for the entire proposed area. See 9 Real Property Service: Illinois § 49:1, at 8 (1989); accord 2 K. Young, Anderson's American Law of Zoning § 11:12 *et seq.* (1989). The concept of this development, known as the Mill Creek Development, was to combine open space with residential areas. A golf course was to constitute part of that open space. The development surrounds plaintiffs' property. A public road, Bartelt Road, adjoins the east side of the property. The land adjoining plaintiffs' western boundary was formerly a cornfield.

In 1986 and 1987, Shodeen interviewed golf course architects. He also began work with government agencies and adjoining neighbors of the development, including plaintiffs, to obtain approval and authority for planning the development. The neighbors had the right to contest the development by objecting to those government agencies.

In 1991, the Mill Creek Country Club, Inc., was created as a subsidiary to Sho-Deen, with Shodeen as the country club's sole shareholder. Its purpose was to design and build a golf course.

In April 1992, Shodeen invited plaintiffs and other neighbors to review the concept plan for the development. For the next two years, plaintiffs and Shodeen

negotiated. However, they now disagree as to the subject of their negotiations and the result thereof.

According to defendants, Shodeen negotiated with plaintiffs so that the development would impact them as little as possible. The original concept plan provided for the rear lawns of single-family residences to adjoin plaintiffs' western boundary. Facing these residences would be a golf course fairway. The fairway would have residences facing it on the east and the west. In other words, the residences facing the fairway on the east would stand between it and plaintiffs' western boundary.

Plaintiffs told Shodeen that they did not want housing adjoining their property. Shodeen then permitted plaintiffs to choose between the housing, a bicycle path, or the fairway. Plaintiffs chose the fairway to abut their property's western boundary and made other requests that he granted. Accordingly, Shodeen changed the development plan by removing the housing on the east side of the fairway and relocating the fairway to adjoin plaintiffs' western boundary.

According to Shodeen, Larry Geddes not only negotiated an agreement with Shodeen, but also publicly endorsed it. In June or July 1993, Geddes spoke at a county development planning committee meeting. Geddes said that "he had worked quite a bit with Mr. Shodeen in order to get things where they are, and he didn't want the board to mess around with it." By that time, Shodeen and Geddes had agreed on placing the golf course adjacent to the western boundary of plaintiffs' property.

However, according to plaintiffs, they did not negotiate any specific land use of defendants' property. Rather, plaintiffs only wanted assurances from defendants that the use of their property would not impact plaintiffs' property use. Plaintiffs never requested that a golf course – especially a golf course fairway – be located adjacent to their property.

On June 3, 1994, plaintiffs and Sho-Deen signed an agreement, which stated in pertinent part:

> "Sho-Deen, Inc., will provide and install at its expense an eight foot (8') high chain link fence with two (2) fourteen foot (14') entrance gates on Bartelt Road along the complete common border of the Mill Creek Development with the Geddes' property. The fence and gates will be installed *when the golf course fairway that borders the Geddes' western property line is constructed* * * * ." (Emphasis added.)

The agreement further provides as follows. Sho-Deen would plant a landscape border along the Mill Creek side of the fence. Sho-Deen would not plan a bicycle path along any border of plaintiffs' property, or construct any houses within 100 feet of the south and west boundaries thereof. Sho-Deen would provide for a 40-foot "green area and landscape easement" along the south boundary of plaintiffs' property. The agreement made several references to a "golf course." The agreement concludes that plaintiffs agree not to protest the development as long as Sho-Deen complies with the agreement.

Sho-Deen received county approval for the Mill Creek development. None of the neighboring property owners or relevant government agencies objected. The

development has received an award for design excellence from the National Association of Builders.

Mill Creek Country Club interviewed approximately 25 architects before hiring golf course architect Roy Case to design the Mill Creek Golf Course. Case followed all recognized design criteria. The golf hole at issue is described in the record as either "Hole # 5" or "Hole # 14" (hereafter, fifth hole). The fairway for the fifth hole runs south to north and lies adjacent to the western boundary of plaintiffs' property. The hole is designed so that the first shot is slightly to the west of, *i.e.*, away from, plaintiffs' property. The second shot is slightly east, towards the northwest corner of the property.

The fairway for the fifth hole is 300 feet wide, and is separated from plaintiffs' property by a 25-foot "rough" area. An asphalt golf cart path lies between the fairway and the rough. As noted earlier, an eight-foot-high chain link fence and landscaping, which includes trees over that height, surround plaintiffs' property.

The width of both the fairway and the rough meet recognized design standards. Similar 25-foot separations exist elsewhere in the development.

The following conditions favor golfers hitting errant shots toward plaintiffs' property. The prevailing winds move from the west to the east. Also, most golfers slice rather than hook, *i.e.*, hit the ball to the right of the target as opposed to the left. The following conditions disfavor golfers hitting errant shots toward plaintiffs' property. Plaintiffs' property is out of bounds; golfers are penalized if they hit balls onto plaintiffs' land. No part of the fairway runs in the direction of plaintiffs' property. Also,

the fence and trees separate the fifth hole from plaintiffs' property.

Mill Creek Golf Course began operating in 1996. The course is open to the public. In 1997, approximately 21,000 rounds of golf were played there; in 1998, approximately 23,500 rounds were played. An average of approximately 30,000 rounds of golf are played on courses in the greater Chicagoland area.

When the course opened, plaintiffs began to find golf balls on their property. During the 1997 and 1998 golf seasons, plaintiffs collected 2,128 golf balls on their property. Some of these had landed as far away as 300 feet from the property's western boundary.

Plaintiffs testified as to how the invading golf balls harmed them. Plaintiffs previously grew alfalfa in the area where the golf balls landed. Indeed, a golf ball once struck Larry's tractor while he was mowing the alfalfa field. Plaintiffs planned to use the affected area to grow plants for sale, cultivate "pick-your-own" vegetables, and build greenhouses and similar structures. Plaintiffs had drilled a well and had hired an architect to plan a retail nursery building. Plaintiffs feared that the golf balls would injure themselves, their family, and their customers, and would damage their planned greenhouses.

However, the following evidence was also adduced at trial. Plaintiffs' residence and other existing buildings are not in the affected area. No person on plaintiffs' property had ever been struck by an invading golf ball. Persons on plaintiffs' property would be in no more danger of being struck than those walking in other areas in the development. No one had ever told plaintiffs that

the golf balls inhibited the property's suitability for being farmed. Plaintiffs stopped growing the alfalfa crop not because of the golf balls, but rather because they planned to use that land for cultivating plants for their nursery business. No one had ever told plaintiffs that the golf balls prevented them from placing greenhouses in the area or cultivating plants for their nursery business.

Shodeen was asked whether, at the time of the agreement, he knew that plaintiffs would have golf balls on their property. He answered: "I would imagine they'd have some, sure." However, it "[d]idn't occur" to him to "specifically tell them they were going to have golf balls." Also, the agreement with Sho-Deen did not specifically mention the possibility of golf balls entering plaintiffs' property.

Plaintiffs testified that they knew nothing about the game of golf. If plaintiffs had anticipated the golf ball problem and its impact on their property, they would have objected to the golf course.

Defendants presented testimony that the development generally increased the value of plaintiffs' property. Sho-Deen paid for most of the construction costs of a new school located near plaintiffs' property. A neighborhood school further increases property values. Particularly, the placement of the golf course fairway adjacent to plaintiffs' property further enhanced the value of plaintiffs' land.

Plaintiffs complained to defendants that the invading golf balls interfered with plaintiffs' business and residential quality of life. Defendants, through their legal counsel, responded only that the course met industry

standards. However, Shodeen talked with plaintiffs about defendants' possibly planting additional trees adjoining plaintiffs' property, but no agreement was reached. At least once, Shodeen asked plaintiffs if they wanted to relocate at his expense. According to Shodeen, it would not be possible to relocate or otherwise change the fifth hole because of the various approvals necessary from all of the applicable government agencies.

In closing argument, plaintiffs clarified that they were not seeking monetary damages. They also acknowledged "that it's virtually impossible to abate * * * all of the golf balls from coming into their property. Once in awhile you're going to have an errant shot. It's going to go in there." However, plaintiffs complained that "they've gotten absolutely nothing from the Defendants." In their trial brief, plaintiffs suggested, *inter alia*, that the court "could order that [the fifth hole] be closed until such time that Defendants have implemented a plan to abate the trespass and nuisance."

Following the trial, the court found, *inter alia:*

> "4) * * * [T]here was no evidence produced as to what specific acts the defendants themselves engaged in or the manner in which those activities were conducted which caused or enabled the golf balls to go into plaintiffs' property.
>
> 5) Moreover there was no evidence produced as to what actions the defendants could have taken, but didn't, to prevent or limit the golf balls from landing in plaintiffs' property.
>
> 6) Rather the evidence shows that the Fifth Hole by design went north from the teebox to

the green requiring that golf balls be driven in a direction other than toward the plaintiffs' property.

7) In addition the easterly border of the defendants' property immediately adjacent to the plaintiffs' property was landscaped in such a fashion as to render it out of bounds to golfers thereby removing any need or incentive to intentionally drive a golf ball in the direction of the plaintiffs' property.

8) Use of one's property for a golf course is neither unlawful nor a nuisance per se and there was no evidence produced that the golf course here constituted an ultra hazardous activity.

9) Under the circumstances shown by the evidence produced by the plaintiffs a claim to enjoin altogether the use by defendants of their property as a golf hole is over broad and facially inequitable.

10) The plaintiffs have failed to sustain their burden of proof."

The trial court entered judgment in favor of defendants.

The appellate court, with one justice dissenting, affirmed, holding that the trial court's judgment was not against the manifest weight of the evidence. No. 2-99-0370 (unpublished order under Supreme Court Rule 23). The appellate court concluded that defendants' conduct did not constitute an intentional trespass and an intentional private nuisance. Accordingly, the appellate court reasoned that there was no basis for the trial court to issue an injunction.

Plaintiffs appeal. Additional pertinent facts will be discussed in the context of the issues raised on appeal.

DISCUSSION

Plaintiffs contend that the evidence at trial demonstrated that defendants' conduct resulted in an intentional trespass and an intentional private nuisance. Defendants contend that the evidence demonstrated that plaintiffs should be estopped from bringing their claims. We first consider defendants' contention.

Equitable Estoppel

Defendants invoke the doctrine of equitable estoppel. Defendants claim that plaintiffs, by their conduct, are estopped from bringing their action. According to defendants, plaintiffs chose the fairway over other options that Sho-Deen presented to them and made other requests that Sho-Deen granted. Sho-Deen, at great expense, redesigned the development plan to accommodate plaintiffs. The agreement between plaintiffs and Sho-Deen, which contains several references to a golf course and a specific reference to the fairway, memorializes plaintiffs' requests. Defendants argue that plaintiffs' conduct prevents them from maintaining this action.

Defendants pled this affirmative defense and presented supporting evidence and argument in the trial court and argued it in the appellate court. The trial court made no findings regarding this issue and the appellate court did not address it. However, "the appellee may urge any point in support of the judgment on appeal,

even though not directly ruled on by the trial court, so long as the factual basis for such point was before the trial court." *Shaw v. Lorenz,* 42 Ill. 2d 246, 248 (1969); accord *American National Bank & Trust Co. v. National Advertising Co.,* 149 Ill. 2d 14, 21 (1992); *La Salle National Bank v. Village of Grayslake,* 29 Ill. 2d 489, 492 (1963). Since the record contains the factual basis for the defense of equitable estoppel, we will address the merits of this contention.

The general rule is that where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct, that person will not be allowed to deny his or her words or acts to the damage of the other party. *Dill v. Widman,* 413 Ill. 448, 455 (1952); *Bondy v. Samuels,* 333 Ill. 535, 545 (1929). Equitable estoppel may be defined as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse. *M.J. Oldenstedt Plumbing Co. v. K mart Corp.,* 257 Ill. App. 3d 759, 764 (1994); *Byron Community Unit School District No. 226 v. Dunham-Bush, Inc.,* 215 Ill. App. 3d 343, 348 (1991); 18 Ill. L. & Prac. *Estoppel* §22 (1956).

To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon;

(4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof. *Vaughn v. Speaker,* 126 Ill. 2d 150, 162-63 (1988).

Regarding the first two elements, the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive. *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.,* 114 Ill. 2d 133, 148 (1986). Although fraud is an essential element, it is sufficient that a fraudulent or unjust effect results from allowing another person to raise a claim inconsistent with his or her former declarations. *Cessna v. Montgomery,* 63 Ill. 2d 71, 86 (1976); *Dill,* 413 Ill. at 456; *M.J. Oldenstedt Plumbing Co.,* 257 Ill. App. 3d at 764. The following corollary must be remembered:

> "Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent. [Citations.] It is the duty of a person having a right, and seeing another about to commit an act infringing upon it, to assert his right. He cannot by his silence induce or encourage the commission of the act and then be heard to complain." *Bondy,* 333 Ill. at 546.

The question of estoppel must depend on the facts of each case. The party claiming estoppel has the burden of proving it by clear and unequivocal evidence. *Jennings v.*

Bituminous Casualty Corp., 47 Ill. App. 2d 243, 249 (1964); see 18 Ill. L. & Prac. *Estoppel* §36 (1956).

Applying these principles to this case, we conclude that defendants' estoppel defense is meritorious. Injustice would result in allowing plaintiffs to bring these claims. Plaintiffs, by their conduct, induced or encouraged defendants to design and build the fifth hole. For plaintiffs to assert these claims now would be inequitable and damage defendants.

Plaintiffs attempt to avoid the consequences of their conduct with Sho-Deen. Initially, plaintiffs claim in their reply brief that they "never *requested* that the golf course be located next to their property." (Emphasis added.) This is beside the point. The record clearly and unequivocally shows that plaintiffs knowingly *agreed* to the placement of the fairway. The original concept plan provided for single-family residences to adjoin the western boundary of the property. Sometime during the following two years, Sho-Deen and plaintiffs agreed on the placement of the fifth hole fairway next to plaintiffs' property. The record contains unrebutted testimony that, prior to signing the formal agreement, Larry Geddes informed a county development planning committee meeting of his work with Shodeen and asked the board not to alter any of the proposed plans as they related to him. Finally, plaintiffs signed the 1994 agreement, which refers throughout to a golf course, and once specifically to "the golf course fairway that borders the Geddes' western property line."

Acknowledging that they agreed to the placement of the fifth hole adjacent to their property, plaintiffs contend that their decision was not a knowing one. In their reply

brief, plaintiffs argue that "the agreement is silent as it relates to golf balls," and "the concept of golf balls is never addressed in the 1994 agreement." Plaintiffs testified that when they signed the agreement, and during the construction of the golf course, they knew nothing about the game of golf. They had no idea of the number of errant golf balls that would enter their property.

This contention lacks merit. That golfers do not always hit their golf balls straight is a matter of common knowledge; it is a fact that needs no supporting evidence, a principle that needs no citation of authority. Courts have long acknowledged this axiom: " 'It is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost.' " *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 241 (1938), quoting *Benjamin v. Nernberg*, 102 Pa. Super. 471, 475-76, 157 A. 10, 11 (1931); accord *Patton v. Westwood Country Club Co.*, 18 Ohio App. 2d 137, 139, 247 N.E.2d 761, 763 (1969) ("It is generally known that the average golfer does not always hit the ball straight"). Indeed, "it is a matter of common knowledge that on practically all golf courses, including those constructed on vast acreages where the fairways are wide and well separated by rough and shrubs," a golfer can slice or hook a ball off of the fairway. *Campion*, 295 Ill. App. at 235. For a thorough discussion of the various golf errors that could result in golf balls intruding on plaintiffs' property, see *Patton*, 18 Ohio App. 2d at 139-40, 247 N.E.2d at 763. This condition is as natural as gravity or ordinary rainfall.

We repeat: it is a matter of common knowledge that golfers do not always hit their shots straight. Defendants knew it. This axiomatic proposition is evidenced by Sho-deen's assumption that plaintiffs would have some golf balls on their property. However, plaintiffs also knew it. This is evidenced by the agreement provision that plaintiffs' property be surrounded by an eight-foot-high fence with landscaping that includes trees over that height. Even assuming that plaintiffs did not know of this fact of life, they reasonably should have. Plaintiffs cannot avoid the reasonable results of their conduct.

Regarding the third element of equitable estoppel, defendants did not know, either at the time of the agreement or during the construction of the fifth hole, that plaintiffs would act in a manner contrary to the agreement. Fourth, plaintiffs, of course, expected that Sho-Deen would perform all of the provisions of the 1994 agreement. Plaintiffs' promise not to protest the construction of the golf course, specifically the fifth hole, was conditional on Sho-Deen's compliance with the agreement.

Fifth, defendants reasonably relied upon plaintiffs' conduct to their detriment. All agreements between adults should be entered into thoughtfully. This admonition takes on increased significance in the context of a planned unit development:

> "*Obtaining approval for a planned unit development can involve considerable negotiation:* with other developers on a project, *with the community,* and with the local zoning board. * * * Often more amenities, such as open space or recreational facilities, are provided under a PUD

> [planned unit development] than could be required by local law." (Emphasis added.) 9 Real Property Service: Illinois §49:1, at 8 (1989).

The creation of the golf course, specifically the fifth hole, required considerable negotiation with many public and private parties, including plaintiffs. Sho-Deen obtained their approval and, based thereon, built the fifth hole.

Regarding the sixth element of equitable estoppel, defendants would be prejudiced if plaintiffs were permitted to deny their conduct. Initially, the original concept plan had residences adjoining the fifth hole on the east, between the fairway and plaintiffs' property. The record contains unrebutted evidence that there would have been approximately 14 of these lots, and Shodeen would have charged an additional $15,000 for each lot because it would have adjoined the fairway. Thus, Sho-Deen lost approximately $210,000 in lot "premiums" by placing these residences elsewhere. Additionally, the record contains evidence that Sho-Deen incurred other costs in relocating the fifth hole, *e.g.*, $25,000 for re-engineering the area.

Not only did Sho-Deen incur costs in relocating the fifth hole, it now would be problematic to move it or close it. Residences were planned for the west side of the fifth hole. The price of those lots include the additional "premium" for adjoining the fairway. If Sho-Deen now moved or closed the fifth hole, it could be liable for violating the PUD agreement with other lot owners. See *Chicago Title & Trust Co. v. Weiss*, 238 Ill. App. 3d 921, 925-26 (1992).

"An injunction will be refused where the complainant has actively encouraged defendant to undertake the work and then has silently, without protest, permitted defendant to go ahead with the work in disregard of the right of complainant." *Bondy*, 333 Ill. at 551. In this case, plaintiffs are equitably estopped from bringing their claims.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed.

Appellate court judgment affirmed.

No. 2 - 99 - 0370

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LARRY GEDDES and CHOH-YING GEDDES, Plaintiffs-Appellants, v. MILL CREEK COUNTRY CLUB and AMERICAN GOLF CORPORATION, Defendants-Appellees.	Appeal from the Circuit Court of Kane County. No. 98 - CH - 591 Honorable Patrick J. Dixon, Judge, Presiding.

RULE 23 ORDER

(Filed Feb. 1, 2000)

Plaintiffs, Larry and Choh-Ying Geddes, filed an action for intentional trespass and nuisance against defendants, Mill Creek Country Club and American Golf Corporation. Plaintiffs alleged that errant golf balls shot onto their property from defendants' neighboring golf course prevented them from developing their land in the manner they wanted. Following a bench trial, the circuit court of Kane County entered judgment in favor of defendants and against plaintiffs and dismissed plaintiffs' complaint. Plaintiffs appeal. We affirm.

Plaintiffs filed this action on July 29, 1998, seeking a declaratory judgment, injunctive relief, and monetary damages. On August 17, 1998, plaintiffs filed their

amended complaint, alleging intentional trespass and nuisance arising from continual bombardment by errant golf balls played from the fifth hole of defendants' golf course. Plaintiffs alleged that, as a result of the influx of golf balls, they were unable to develop that part of their property adjacent to the golf course. The matter proceeded to a bench trial at which the following evidence was adduced.

Larry Geddes testified that plaintiffs live on a 16½-acre parcel adjacent to the Mill Creek golf course with the fifth hole running along the western border of plaintiffs' land. Plaintiffs purchased the property and have lived there since December 1986. Plaintiffs run a landscaping and nursery business and use their land in the furtherance of their business.

Larry Geddes testified that, in 1994, plaintiffs entered into a written agreement with Kent Shodeen, the principal of the Mill Creek Country Club. He testified that the agreement was to protect both plaintiffs and defendants with respect to the development of each party's land. The agreement included a provision prohibiting plaintiffs from protesting the Mill Creek development. Larry Geddes testified that the agreement did not address the issue of golf balls entering plaintiffs' property. He further testified that, had he known about the golf ball problem and its impact on his plans to develop his property, he would have objected to the Mill Creek development.

Larry Geddes testified that plaintiffs' property is zoned to allow the construction of greenhouses and areas from which customers could pick their own vegetables and other crops. Larry Geddes testified that, following a

successful rezoning application, to which defendants objected, plaintiffs drilled a well and retained an architect to design a building for the retail sale of flowers and other nursery products.

Larry Geddes testified that, when the golf course opened in the summer of 1996, plaintiffs began to find golf balls on their property. He stated that the area in which the golf balls were found used to be an alfalfa field. Larry Geddes testified that he had voluntarily discontinued harvesting the alfalfa and instead was planning to use the field for cultivating plants for the nursery business. He testified that he saw the golf balls come from the Mill Creek golf course and once, when he was mowing the field, his tractor was struck by a golf ball. He also testified that no person on his property had ever been struck by a golf ball.

Larry Geddes testified that he contacted Kent Shodeen concerning the golf balls. Shodeen did not take any action. Instead, plaintiffs received a letter from Shodeen's lawyer indicating that the developer was neither responsible nor liable for the presence of golf balls on plaintiffs' property. During 1997 and 1998, plaintiffs collected 2,128 golf balls and Larry Geddes testified that, due to the terrain in the old alfalfa field, there were many more undiscovered golf balls.

On cross-examination, Larry Geddes testified that during the zoning process for the Mill Creek subdivision, he abided by the provisions of the 1994 agreement and did not object to the subdivision. He also admitted that no one had informed him that the presence of golf balls on his property inhibited its suitability for farming or

that he could not place greenhouses or cultivate nursery plants for his business. Larry Geddes also acknowledged that he had filed a federal civil rights lawsuit against Kane County, which included a count alleging an unjust taking of property and discrimination in the zoning process.

David Patzelt testified that he was vice president of Sho-Deen Inc., and oversaw the construction of the Mill Creek golf course. As a result of his responsibilities, he became familiar with golf course construction, design, and industry standards. He also became familiar with the workings of planned unit developments (PUDs).

Patzelt testified that the standard width of a golf hole is 300 feet and that the fifth hole is 300 feet wide. Patzelt testified that defendants placed an eight foot high chain link fence along the property line between plaintiffs' land and the golf course. He also testified that edge of the fairway is 25 feet from the property line and between plaintiffs' property and the fairway runs an asphalt golf cart path. Patzelt testified that the prevailing winds are from the west and that most golfers slice, so that these conditions favor errant shots traveling toward plaintiffs' property.

Patzelt testified that, as a result of his duties, he learned that plaintiffs requested that defendants place the golf course adjacent to their property. Patzelt testified that the profit-maximizing use of defendants' property would have been to place residential units adjacent to plaintiffs' property as buyers paid a premium to live along the golf course. Patzelt testified that, in his opinion, the value of plaintiffs' property had been increased as a

result of the construction of the Mill Creek subdivision. He further testified that defendants expanded approximately $149,000 in improvements to plaintiffs' property. This figure included the cost of the fence, landscaping, and drainage and sewer improvements.

Patzelt testified that he did not believe that plaintiffs' use and enjoyment of their land was impaired by the presence of golf balls because the field in which golf balls had been found had been used for straw or hay. He also testified that he had seen plaintiffs' plans to construct greenhouses and pick-your-own produce plots and stated that they were not in the location where golf balls had been discovered. He testified that he believed a greenhouse may be able to sustain a strike from a golf ball and that plaintiffs' customers would be in no more danger of being struck than those walking in the rear yards, on the bike paths, pedestrian paths, or on the street.

Patzelt noted that approximately 44,000 rounds of golf had been played in 1997 and 1998. He further testified that plaintiffs' property was out-of-bounds, so the golfers had an incentive to avoid hitting their balls onto plaintiffs' land and that the direction of the hole is away from plaintiff's property.

Kent Shodeen testified that he was a developer of the Mill Creek subdivision and that he owns Sho-Deen, Inc., the parent of Mill Creek Country Club, Inc. Shodeen testified that he controlled the design and operation of the golf course and that the golf course had been leased to American Golf Corporation.

Shodeen testified that the Mill Creek development consisted of approximately 1,450 acres. The placement of

the golf course within the development was required to be approved by 22 different government agencies. He testified that the concept of the development was to mix residential homes with open space, which included the golf course. The Mill Creek subdivision benefits the community by providing a school as well as economic benefits. In addition, the development recently received an award for design excellence from the National Association of Builders.

Shodeen testified that, in order to be a good neighbor, he offered plaintiffs three choices in the construction of the development. Plaintiffs could choose to have the golf course, houses, or a bike path constructed adjacent to their land. Shodeen testified that the plaintiffs chose the golf course, which cost defendants 14 or 15 golf course lots and the attendant premiums.

Shodeen testified that, at the time the 1994 agreement was signed, he "imagine[d]" that plaintiffs would get some golf balls on their property. He did not inform plaintiffs of this fact, however, because it did not occur to him to tell them. Shodeen testified that plaintiffs contacted him several times about the golf ball problem and that he instructed the course managers to relocate the tee markers. Shodeen testified he had no knowledge of whether the tee markers were in fact moved.

Shodeen testified that he asked the plaintiffs if they wanted to relocate at least once. He testified that he was aware of plaintiffs' plans for developing their property, but in his opinion, the golf balls did not have an adverse effect on plaintiffs' property and did not constitute an

unreasonable interference with plaintiffs' use and enjoyment of their property. He testified that he believed the value of plaintiffs' property has been increased by the Mill Creek development and its proximity to the golf course. Shodeen testified that the golf course currently had 20 holes out of a planned 27 but that it would not be possible to relocate the fifth hole or otherwise change it as a result of the PUD requirements, including the various approvals necessary from all of the governmental agencies.

Choh-Ying Geddes testified that the 1994 agreement failed to protect plaintiffs because there were a lot of things that could not be covered in a contract. She specifically testified about the golf balls and a flood.

Choh-Ying Geddes testified that she has found golf balls as far as 300 feet into her property and that she does not go out into the old alfalfa field for fear of being struck by a golf ball. She also testified that the developers used plaintiffs' driveway to turn around. She further testified that, after a flood, she contacted Patzelt who told her the 1994 agreement was no longer in force. Choh-Ying Geddes testified that Patzelt stated that he would throw a load of dirt on the erosion to stop the flooding.

Choh-Ying Geddes believed that defendants have an absolute right to develop their property. She testified that defendants asked many times whether plaintiffs were interested in relocating, but that she does not want to move from her property. Although she was aware that defendants were planning to build a golf hole next to her and her husband's property, she has been surprised to

find golf balls on the property. Choh-Ying Geddes testified that, had she known in advance about the golf balls problem, she would have objected to the Mill Creek development.

The trial court decided in favor of defendants and against plaintiffs. The trial court found that plaintiffs had failed to sustain their burden of proof by failing to adduce evidence concerning either how defendants had acted to cause the golf balls to go onto plaintiffs' property or how defendants could have limited or prevented the golf balls from going onto plaintiffs' property, and that plaintiffs' "claim to enjoin altogether the use by [d]efendants of their property as a golf hole [was] over broad and facially inequitable." Plaintiffs timely appeal.

Plaintiffs first contend that the trial court erred in determining that they "failed to sustain their burden of proof." While this contention is somewhat ambiguously drawn, we interpret plaintiffs' argument to be that the trail court's determination was against the manifest weight of the evidence. Essentially, plaintiffs argue that the evidence establishes that defendants permitted a continuing trespass to occur. According to plaintiffs, defendants' knowledge that golf balls would land on plaintiffs' property coupled with the fact that defendants failed to inform plaintiffs that golf balls would land on their property, demonstrate that the trespass was intentional. We disagree.

A trespass is the entry onto another's land without permission, invitation or other right. *Benno v. Central Lake County Joint Action Water Agency*, 242 Ill. App. 3d 306, 313

(1993). One may be liable in trespass for either negligently or intentionally causing a thing or third person to enter another's land. *Millers Mutual Insurance Ass'n v. Graham Oil Co.*, 282 Ill. App. 3d 129, 139 (1996). Thus, possession of the encroached-upon land or deprivation of the right to possess the land is not an essential element to prove an action of trespass. *Millers Mutual*, 282 Ill. App. 3d at 139.

Here, Shodeen testified that he "imagine[d]" that some golf balls would land on plaintiffs' property. However, this admission alone does not transform the fact that golf balls actually landed on plaintiffs' property into an intentional trespass. Defendants did not intend golfers to drive their balls onto plaintiffs' property. Rather, defendants intended golfers to hit their balls toward the fifth hole. However, inherent in the game of golf is the likelihood that a golfer will make an errant shot which will land out-of-bounds. Indeed, where, as here, the golf course is surrounded by private property, the likelihood of golf balls landing on another's land is greatly enhanced. The fact that Shodeen did not inform plaintiffs that golf balls could land on their property is irrelevant. Common sense dictates that errant golf balls are likely to land on property located next to a golf course.

Plaintiffs also complain that the design of the fifth hole makes it more likely for errant golf balls to land on their property. Again, we disagree.

The evidence demonstrates that the golf course was designed to minimize the number of errant golf balls from landing on plaintiffs' property. The fairway of the fifth hole, which is parallel to plaintiffs' property line, is

300 feet wide, the industry standard. There is a 25 foot border between the fairway and plaintiffs' property line. An asphalt golf cart path, which runs between the fairway and plaintiffs' property line, serves as a disincentive to hit the golf ball in the direction of plaintiffs' property. While there was also testimony that conditions favor errant shots toward plaintiffs' property, defendants addressed this problem by directing the hole to the left, away from plaintiffs' property. Defendants also erected an 8-foot high chain-link fence, landscaped the area near plaintiffs' property, and requested the golf course managers to change the location of the tee markers.

Moreover, there is no incentive for individual golfers to intentionally hit their balls onto plaintiffs' property or for defendants to intentionally cause golfers to want to hit their balls onto plaintiffs' property. Golf is " a game whose object is to sink a golf ball into each of the 9 or 18 successive holes on a golf course *using as few strokes of a golf club as possible and avoiding various natural or artificial hazards or obstacles.*" (Emphasis added.) Webster's Third New International Dictionary 976 (1971). As Patzelt testified, pursuant to the rules of golf, a golfer who hit a ball onto plaintiffs' property would incur a penalty for hitting the ball out-of-bounds.

Additionally, we find plaintiffs' allegations disingenuous in light of the evidence that they elected to have the golf course placed adjacent to their property. At trial, Shodeen testified that he offered the plaintiffs the option of having the golf course, houses, or a bike path adjacent to their property. Plaintiffs opted to have the golf course border their property, and this was incorporated into the 1994 agreement. Now, plaintiffs seem surprised that *any*

gold [sic] balls have landed on their property. We acknowledge plaintiffs' testimony that they were unfamiliar with the game of golf. However, it strains credulity to believe that even individuals unfamiliar with the game of golf would not expect to find any golf balls on property they own which abuts a golf course. The sole purpose of constructing a golf course is to allow golfers to indulge in golf. As previously mentioned, inherent in the game is the possibility that a golfer will drive a ball out-of-bounds and onto neighboring land. As a result, we find that plaintiffs failed to show that defendants' actions constituted an intentional trespass.

Before we discuss the remaining issues raised by plaintiffs, we address the dissent's suggestion that in resolving the intentional trespass issue, we have ignored the intent of the defendants. We respectfully disagree. Contrary to the suggestion of the dissent, defendants did not intend golfers to hit golf balls onto plaintiffs' property. Rather, as we mention above, defendants intended golfers to hit their balls toward hole number five. Hole number five is located away from plaintiffs' property. That Shodeen "imagine[d]" golf balls to land on plaintiffs' property is merely a common sense acknowledgment that due to the numerous factors that affect the flight of golf balls once they leave the tee, it was likely that some golf balls would land on plaintiffs' property.

We now turn to plaintiffs claim that defendants' actions constitute a nuisance. According to plaintiffs, they are unable to develop, walk on, or otherwise enjoy their land because of the golf balls which land on their property and originate from defendants' golf course. We disagree.

A nuisance is an invasion of another's interest in the private use and enjoyment of land. *Statler v. Catalano*, 167 Ill. App. 3d 397, 403 (1988); *Great Atlantic and Pacific Tea Co. v. LaSalle National Bank*, 77 Ill. App. 3d 478, 485 (1979). The invasion must be substantial and it must be either negligent or intentional and unreasonable. *Woods v. Kahn*, 95 Ill. App. 3d 1087, 1089 (1981). Here, plaintiffs do not allege that defendants' conduct was negligent. Moreover, as discussed in relation to the trespass issue, there is no evidence that defendants intentionally allowed or caused to allow golf balls to land on plaintiffs' property. Defendants merely intended golfers to hit their golf balls toward hole number five. Hole number five was located away from plaintiffs' property. Therefore, plaintiffs have failed to demonstrate that defendants' actions constituted a nuisance.

Because plaintiffs were unable to show that defendants' actions constituted an intentional trespass or a nuisance, there was no basis for the trial court to issue an injunction. *Rockford Blacktop Construction Co. v. County of Boone*, 263 Ill. App. 3d 274, 282 (1994). Accordingly, the trial court's decision to deny plaintiffs injunctive relief was not against the manifest weight of the evidence. See *Gerber v. Hamilton*, 276 Ill. App. 3d 1091, 1093 (1995).

For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.

COLWELL, J., with BOWMAN, P.J., concurring.

JUSTICE INGLIS, dissenting:

Because the majority views an inundation of well over 2,100 golf balls to be nothing more than an insignificant inconvenience, I must respectfully dissent. In my view, regardless of plaintiffs' expectations, the continuing daily bombardment of their property, with golf balls sometimes traveling 300 feet into their property, constitutes both nuisance and a trespass, and prevents plaintiffs from enjoying their land in the manner they choose.

The trial court's determination that a trespass did not occur is against the manifest weight of the evidence. In this case, Shodeen admitted that he knew the operation of the golf course would result in golf balls being shot onto plaintiffs' property. He did not inform plaintiffs that this would occur and there is no evidence in the record to suggest that plaintiffs gave their permission to allow defendants to cause golf balls to come onto their property. Thus, the evidence overwhelmingly demonstrates that a trespass occurred.

I find that majority's argument that defendants lacked the intent to cause a trespass to be wholly without merit. As the majority itself observes, "[t]he sole purpose of constructing a golf course is to allow golfers to indulge in golf." *Supra* at 11. The majority also realizes that it is likely that golfers will hit errant shots onto private property. *Supra* at 9-10. It is therefore puzzling that the majority insists that this demonstrates defendants' lack of intent to cause a trespass. Does the majority suggest that defendants' are accidentally allowing golf to be played on their golf course? Obviously not. Instead, the appropriate measure of intent in this case is not that of the individual golfer, but rather *defendants'* intent. It is the action of allowing the golfers to play combined with defendants'

expectation that golf balls would be hit onto plaintiffs' land that supplies the intentional conduct in this case. Because Plaintiffs proved that defendants intentionally caused an entry onto their land without permission, invitation, or other right (*Benno v. Central Lake County Joint Action Water Agency*, 242 Ill. App. 3d 306, 313 (1993), I would hold that plaintiffs proved intentional trespass.

In addition, I would find that defendants' activities constituted a nuisance. As stated above, defendants' conduct in causing and allowing the golf ball inundation was intentional. Additionally, this inundation inhibited plaintiffs from developing their land as they wished. Further, the sheer volume of errant shots is unreasonable. I would hold that plaintiffs demonstrated that defendants' actions constituted a nuisance as the inundation of over 2,100 golf balls unreasonably interfered with their interest in the private use and enjoyment of their land.

Last, I would find that plaintiffs are entitled to a permanent injunction to abate the plague of golf balls. The trial court is vested with discretion in deciding to grant injunctive relief, and a reviewing court will not disturb that decision absent an abuse of discretion. *Gerber v. Hamilton*, 276 Ill. App. 3d 1091, 1093 (1995). A reviewing court will find an abuse of discretion where the trial court's decision was against the manifest weight of the evidence; the trial court's judgment is against the manifest weight of the evidence where the opposite result is clearly evident. *Gerber*, 276 Ill. App. 3d at 1093.

In order to obtain a permanent injunction, the movant must fully prove the existence of the right to be protected and its violation, irreparable harm, and lack of

an adequate remedy at law. *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124. Additionally, the movant must prove that the injunctive relief will not cause serious loss to the public without a corresponding great advantage to the movant. *Douglas Theater Corp. v. Gold Standard Enterprises*, 188 Ill. App. 3d 573, 579 (1989).

As outlined above, plaintiffs demonstrated that defendants were committing a continuing trespass against their property. Because the trespass is continuing, plaintiffs had shown both irreparable harm and inadequate remedy at law. See *Petrzilka*, 199 Ill. App. 3d at 124 ("[i]rreparable harm is the most common method of proving an inadequate remedy at law and denotes transgressions of a continuing nature so that redress cannot be had at law"). In addition, plaintiffs testified that the barrage of golf balls has forced them to forego developing their land in the manner they desire and in furtherance of their landscaping/nursery business. The record shows that at least about 5% of the golfers (reflected by the over 2,100 balls in 44,000 rounds of golf) hit their balls onto plaintiffs' property. This risk inhibited plaintiffs from developing the old alfalfa field up to this point. This too supports the finding of irreparable harm. Finally, plaintiffs merely request that defendants abate the golf balls. This does note require that defendants shut down the golf course or the fifth hole, or even relocate the fifth hole; only that defendants prevent the golf balls from being shot onto plaintiffs' property, such as by installing netting to direct errant shots back onto the golf course. Thus, the cost to defendants (expense to rectify the problem) is outweighed by the benefit to plaintiffs (the ability to develop

their land in furtherance of their business venture). Likewise, the cost to the public of having defendants correct the problem is less than the benefit of allowing plaintiffs to develop their land and business. I would hold, therefore, that the trial court abused its discretion in refusing to issue a permanent injunction requiring defendants to stop golf balls from being deposited onto plaintiffs' land.

For the foregoing reasons, I respectfully dissent.

[SEAL]

STATE OF ILLINOIS APPELLATE
COURT SECOND DISTRICT

OFFICE OF THE CLERK
847/695-3750
847/695-0092 TDD

APPELLATE COURT
BUILDING
ELGIN, ILLINOIS
60120-5558

Appeal from the Circuit Court of County of Kane

Trial Court No.: 98CH591

THE COURT HAS THIS DAY, 02/25/00, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-99-0370

Geddes, Larry & Choh-Ying v. Mill Creek Country Club, Inc., et al

Upon consideration of the Petition for Rehearing filed by appellant, the Petition for Rehearing is hereby denied.

(Colwell, Bowman, JJ.)
(Inglis, J., dissents)

LOREN J. STROZ
CLERK

cc: Zkuowski, Rogers, Flood & McArdle
Timothy P. Dwyer
Murphy, Hupp, Foote, Mielke & Kinnally
Robert M. Foote
Kathleen C. Chavez

[SEAL]

STATE OF ILLINOIS APPELLATE
COURT SECOND DISTRICT

OFFICE OF THE CLERK
847/695-3750
847/695-0092 TDD

APPELLATE COURT
BUILDING
ELGIN, ILLINOIS
60120-5558

Appeal from the Circuit Court of County of Kane

Trial Court No.: 98CH591

THE COURT HAS THIS DAY, 02/28/00, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-99-0370

Geddes, Larry & Choh-Ying v. Mill Creek Country Club, Inc., et al

Motion by Plaintiffs-Appellants to Publish the Rule 23 Order, entered by this court on February 1, 2000. Justices Colwell and Bowman vote to DENY the motion and Justice Inglis votes to GRANT.

IT IS THEREFORE ORDERED that the motion to publish is DENIED.

LOREN J. STROZ
CLERK

cc: Zkuowski, Rogers, Flood & McArdle
Timothy P. Dwyer
Murphy, Hupp, Foote, Mielke & Kinnally
Robert M. Foote
Kathleen C. Chavez

EXHIBIT A

IN THE CIRCUIT COURT FOR
THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

LARRY GEDDES and CHOH-YING GEDDES, Plaintiff,	)	
vs.	)	NO. 98 CH 591
MILL CREEK COUNTRY CLUB, INC. and AMERICAN GOLF CORPORATION, Defendants.	)	

ORDER

This matter coming on for hearing upon a complaint for permanent injunction, the court taking testimony, reviewing the exhibits, hearing argument and being advised in the premises; FINDS:

1) The plaintiffs own property to the east of and immediately adjacent to that portion of the property upon which the defendant owner of the latter property has constructed the Fifth Hole of a golf course leased to and operated by the codefendant.

2) The evidence shows that golf balls have ended up in the undeveloped portion of plaintiffs' property.

3) While there was produced no direct evidence that the golf balls came onto plaintiffs' property

as a result of activities conducted on the defendant's property, the defendants do not dispute that contention and it is reasonable to imply that to be the case.

4) Nevertheless there was no evidence produced as to what specific acts the defendants themselves engaged in or the manner in which those activities were conducted which caused or enabled the golf balls to go into plaintiffs' property.

5) Moreover there was no evidence produced as to what actions the defendants could have taken, but didn't, to prevent or limit the golf balls from landing in plaintiffs' property.

6) Rather the evidence shows that the Fifth Hole by design went north from the teebox to the green requiring that golf balls be driven in a direction other than toward the plaintiffs' property.

7) In addition the easterly border of the defendants' property immediately adjacent to the plaintiffs' property was landscaped in such a fashion as to render it out of bounds to golfers thereby removing any need or incentive to intentionally drive a golf ball in the direction of the plaintiffs' property.

8) Use of one's property for a golf course is neither unlawful nor a nuisance per se and there was no evidence produced that the golf course here constituted an ultra hazardous activity.

9) Under the circumstances shown by the evidence produced by the plaintiffs a claim to enjoin altogether the use by defendants of their property as a golf hole is over broad and facially inequitable.

10) The plaintiffs have failed to sustain their burden of proof.

IT IS ORDERED that judgment be and is entered in favor of the defendants and against the plaintiffs and that the plaintiff's complaint be and is dismissed.

Enter this 15 day of March AD 1999

/s/ Patrick J. Dixon
Judge

(SEAL)

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

June 29, 2001

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2038

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
180 NO. LASALLE ST.
CHICAGO 60601

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 793-1333

Mr. Timothy P. Dwyer
Law Office of Timothy P. Dwyer
240 West River Drive
St. Charles, IL 60174

No. 89269 – Larry Geddes et al., appellants, v. Mill Creek Country Club et al., appellees. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on July 9, 2001.

EXHIBIT A

AGREEMENT

For and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable consideration paid by LARRY G. GEDDES AND CHOH-YING GEDDES ("Geddes"), of 0N790 Bartelt Road, Geneva, Illinois, the receipt and sufficiency of which are hereby acknowledged by SHO-DEEN, INC. ("Sho-Deen, Inc."), Sho-Deen, Inc. agrees as follows:

A. Sho-Deen, Inc. will provide and install at its expense an eight foot (8') high chain link fence with two (2) fourteen foot (14') entrance gates on Bartelt Road along the complete common border of the Mill Creek Development with the Geddes' property. The fence and gates will be installed when the golf course fairway that borders the Geddes' westerly property line is constructed, but in any event no later than the date the final plat of neighborhood "A", as depicted on Exhibit "C", is recorded.

B. Sho-Deen, Inc. will plant at its expense a landscape border along the Mill Creek side of the aforementioned eight foot (8') high chain link fence as per that drawing labeled "Site Detail – Geddes Property", Lannert Group, Job No. 9162P dated (completed) January 4, 1994 for Sho-Deen, Inc., Owner/Developer, Revision dated April 8, 1994, attached as exhibit "A", which drawing is incorporated herein by reference (the "Site Detail Plan") on or before the date the final plat of neighborhood "A", as depicted on Exhibit "C", as recorded.

C. Sho-Deen, Inc., at its expense, will

(1) run a sanitary sewer line stubbed to the Geddes' home to a usual and customary location or a location agreeable to the Geddes and Sho-Deen, Inc. at no charge to the Geddes.

(2) run a water line with a water meter connected into the Geddes' domestic water line at a usual and customary location or location agreeable to the Geddes and Sho-Deen, Inc.

In the event that the Geddes' domestic water well is contaminated due to actions attributed to the development of Mill Creek, or their domestic water well fails to be productive for any reason, Sho-Deen, Inc. agrees to provide at its expense potable water to the Geddes for their domestic use only, as long as the Geddes reside in their current home by reimbursing the Geddes for their monthly domestic water usage on a month-by-month basis. If Geddes decide to use the potable water while their well is not contaminated or while their well is productive, then Geddes will pay the usual and customary fees for water usage which are charged by the Mill Creek Water Reclamation District.

The Geddes will be responsible for the usual and customary fees charged by the Mill Creek Water Reclamation District for the usage thereof, but shall not be responsible for water or sanitary sewer "tap-on" fees or connection fees, which fees shall be paid by Sho-Deen, Inc. The area disturbed due to the installation of any sanitary sewer and/or water line will be graded to match the original grade and seeded by Sho-Deen, Inc. at its expense. With respect to water, this paragraph supersedes paragraph D hereof.

D. Sho-Deen, Inc. will pay the cost of bringing all public utilities along or near the Geddes' property to include but not limited to sewer, natural gas, underground electric, telephone and cable television lines. The actual cost of physical connection will be at the Geddes' expense.

E. Sho-Deen, Inc. agrees that it will not request, plan or accept provision for a bicycle path along any border of the Geddes' property, unless required by Kane County. Sho-Deen, Inc. will use its best efforts to provide a plan so that any such path is planned so as not to border the Geddes' property.

F. Except for easements required to serve the Geddes' property with sewer and water, no utility easements beyond those that currently exist will be accepted, requested or planned to cross the Geddes' property on the west side of Bartelt Road.

G. Sho-Deen, Inc. agrees to provide for the prohibition against construction of any homes within one hundred feet (100') of the south and west boundaries of the Geddes' property. Additionally, a forty foot (40') green area and landscape easement will be provided along the south boundary of the Geddes' property as depicted on the Site Detail Plan.

H. The metal barn at the southeast corner of Keslinger Road and Bartelt Road will be moved to the location shown on the Development Plan no later than July 1, 2000 and used only as a maintenance/storage shed for the golf course.

I. Sho-Deen, Inc. agrees not to request, plan or allow any special assessments to be imposed on

the Geddes' property for any of the improvements that Sho-Deen, Inc. installs or provides for Mill Creek. In the event such special assessments are imposed on the Geddes' property, Sho-Deen, Inc. agrees, at its expense, to pay same in full (no installments) immediately upon perfection of the assessment.

J. Sho-Deen, Inc. will provide at its expense whatever means are necessary to control storm water runoff that originates to the west of the Geddes' property so that the development of the Mill Creek Property does not increase the current amount of storm water runoff into the Geddes' property. The parties agree that current storm water runoff that originates to the west of the Geddes' property does not result in the Geddes' property remaining uncharacteristically wet for more than 48 hours after the storm event as long as there is no further rain, freezing conditions or other unusual water conditions. A copy of the overland flow route of storm water water runoff near the Geddes' area is attached as Exhibit "B" and represented by Sho-Deen, Inc. to comply with this Agreement. Detailed drawings will be made available after the final drainage plans for the golf course have been completed to show. Sho-Deen, Inc.'s continuing representation. Sho-Deen, Inc. will correct at its expense any drainage situation in violation of this Agreement.

K. The narrow strip of land along the northern boundary of the Geddes' property will be used only as an access road to the golf course maintenance shed. This access will be gated at Bartelt road at Sho-Deen, Inc.'s expense.

L. Sho-Deen, Inc. agrees not to plan, request or approve sidewalks or on street parking for the

west side of Bartelt Road where it borders the Geddes' property.

M. The following statement will be included in all the sales contracts of homes some neighborhood "A" indicated on the plan marked Exhibit "C".

> This parcel is adjacent to or in close proximity to an active farm, located at 0N790 Bartelt Road, Geneva, Illinois where upon agricultural, livestock and/or nursery/ landscape activities may take place."

N. The Geddes' agree not to protest to the County of Kane, or any other governmental body, Sho-Deen, Inc.'s Mill Creek Development, as long as Sho-Deen, Inc. is in full compliance with the provisions of this agreement.

Dated: June 3rd, 1994.

SHO-DEEN, INC.

By: /s/ Kent W. Shodeen
pres.
Kent W. Shodeen

Address:
17 North First Street
Geneva, Illinois 60134

Dated: June 3rd, 1994.

By: /s/ Larry G. Geddes
Larry G. Geddes

By: /s/ Choh-Ying Geddes
Choh-Ying Geddes

Address:
0N790 Bartelt Road
Geneva, Illinois 60134